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Supreme Court, U.S.
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CASE NO. 96-10

The Supreme Court of the United States

October Term 1996

IN THE MATTER OF CLDC MANAGEMENT CORPORATION [APPEAL OF CLARENCE O. GESCHKE AND IRENE M. GESCHKE]

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Geschkes affirm the accuracy of their *Petition For Writ Of Certiorari* (hereinafter, "petition" or "Pet.").

Contrary to the defendants [*Respondents' Brief In Opposition* (hereinafter, "Brief") p.1], LaSalle National Bank is in fact a defendant in case 79 B 40657. (Pet. pp.5,10,13,26)

The defendants' "corrections" (Brief p.2) are unwarranted, incorrect, devoid of any supporting citations to the case record, and are rebutted as follows:

- The district court did state that its jury instructions were incomplete: "Maybe I am not being consistent in the questions that I am submitting to the jury in that some are more complete than others. I would concede that." (Pet. p.6 citing R.668-1 p.1367)

- The district court first ruled that "Illinois Courts have repeatedly said that . . . where the statements as to future events . . . are part of a fraudulent scheme, then the fact that they do not relate to existing facts as opposed to future events . . . does not prevent their being actionable. This is such a case, at least as far as the plaintiffs' allegations and plaintiffs' evidence is concerned." (Pet. p.9) But the court later instructed the jury that a false statement is one "known to be false at the time it is made, not found out to be inaccurate or false at some time later." (Pet. pp.9-11) The significance of the court's ruling and jury instruction is explained in the petition. (Pet. pp.8,12-14,24-25)

- The district court did not instruct the jury on the Geschkes' claim of a breach of duty of good faith, nor did the court allow the jury to render a verdict on that claim and the defendants fail to cite any part of the record to support their pretension that the district court "expressly instructed the jury" on that issue. (Pet. p.12)

- The district court barred certified documents disclosing the felonies with which ex-defendant John M. "Jack" Organ (d.1987) was charged and convicted, and the prison sentence he received. Those documents are clearly identified and described in the petition. (Pet. p.14,27-28) The defendants fail to explain how the documents could be "hearsay."

- Portions of the case record cited for support in the petition verify that the district court did find in 1993 that the defendants had destroyed documents that the Seventh Circuit had said should have been preserved. (Pet. pp.15-16,28)

ARGUMENT

The defendants argue that two questions the petition presents "are waived": whether the lower courts have condoned a conflict of interest and interference with legal counsel, and whether federal courts may practice extreme delay and disregard the Civil Justice Reform Act, 28 U.S.C. *§§* 471 *et seq*.

The record is absolutely clear that the facts of a conflict of interest were repeatedly drawn to the attention of the district court and the Seventh Circuit, prior to being raised yet again in the petition for rehearing (pp.2-3) in appeal no. 94-3586. (Pet. pp.3-4,15,18,28) Cf. *Maryland v. United States*, 381 U.S. 41, 53, 14 L.Ed.2d 205, 206, 212-213, 85 S.Ct. 1293 (1965) (A question was "properly and timely raised" on appeal where it was raised in a petition for rehearing.).

It is likewise clear that the Seventh Circuit was made aware in 1991, again in 1993, and again in the petition for rehearing (pp.1-2) in appeal no. 94-3586 (Pet. p.1) of the fact that the Geschkes' case had been languishing without trial since 1979. (Pet. pp.21-23)

Thus, the defendants met those two questions throughout proceedings in the lower courts. Cf. *Sabbath v. United States*, 391 U.S. 585, 588, 20 L.Ed.2d 828, 830, 832, 88 S.Ct. 1755 (1968).

The Geschkes have not acknowledged anywhere in the petition that they "deliberately failed" to raise those questions.

Even assuming, for the sake of argument, that the two questions were not properly raised, "consideration of issues not present in the jurisdiction statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 259, 62 L.Ed.2d 461, 464, 469, 100 S.Ct. 540 (1980) (citations omitted). "This Court has in the exercise of its discretion traditionally examined matters of importance not specifically assigned as error by the parties." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 48, 51 L.Ed.2d 124, 128, 157, 97 S.Ct. 926 (1977) (citations omitted).

This Court takes notice of a combination of grave errors even if those errors were not raised in the lower courts. *Rogers v. United States*, 422 U.S. 35, 41, 45 L.Ed.2d 1, 7, 95 S.Ct. 2091 (1975); *Washington Railroad Company v. Bradley*, 77 U.S. 299, 302-303, 19 L.Ed. 894, 895 (1870).

This Court "has the authority and the duty in exceptional circumstances to notice federal court errors to which no exception has been taken, when they `seriously affect the fairness, integrity or reputation of public judicial proceedings.'" *Connor v. Finch*, 431 U.S. 407, 421, 52 L.Ed.2d 465, 478, 97 S.Ct. 1828 (1977), citing *United States v. Atkinson*, 297 U.S. 157, 160, 80 L.Ed 555, 557, 56 S.Ct. 391 (1936).

Exceptional circumstances are those "Conditions which are out of the ordinary course of events; unusual or extraordinary circumstances." *Black's Law Dictionary*, 5th ed., pg. 290

(St. Paul, Minn.: West Publishing Company, 1979). It is unusual and extraordinary for the Geschkes' legal counsel to acknowledge that they had engaged in a clear conflict of interest by simultaneously working for defendants who were accused of fraud and RICO violations, among other counts. It is unusual and extraordinary for a trial court to fail to bring a case to trial for nearly fifteen years.

This Court's Rule 24(1)(a) states that "At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

Plain error is "an error in court proceedings with such fundamental consequences that it must be corrected." David Mellinkoff, *Mellinkoff's Dictionary Of American Legal Usage*, pg.485 (St. Paul, Minn.: West Publishing Company, 1992).

This Court will review a matter not raised below that constitutes "plain error of such a fundamental nature that we should notice it." *Sibbach v. Wilson & Company, Inc.*, 312 U.S. 1, 16, 85 L.Ed. 479, 480, 486, 61 S.Ct. 422, rehearing denied 312 U.S. 713, 85 L.Ed. 1144 (1941) (citations omitted).

This Court has implicitly recognized a "fundamental error rule," having held that it will consider erroneous rulings essential to the foundation of an action. *Magruder v. Drury*, 235 U.S. 106, 113, 59 L.Ed. 151, 153-154, 35 S.Ct. 77 (1914) (citations omitted).

And the lower courts' complete disregard of that conflict of interest, interference with the Geschkes' representation by counsel, and extreme delay, constitutes fundamental error in that it is "Error of such character as to render judgment void." It is error that "will be considered on review, whether assigned as error or not, where the justice of the case seems to require

it." *Black's Law Dictionary*, 5th ed., pg. 487.

The case the defendants cite to support their waiver argument (Brief p.3) involves a petitioner's failure to raise in the court of appeals the issue of a district court's "abuse of discretion in denying costs under Rule 54(d)" which caused this Court to conclude that the issue "is not properly before us." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 67 L.Ed.2d 287, 299, 101 S.Ct. 1146 (1981). That issue, unlike the conflict of interest and delay questions in the Geschkes' petition, did not involve plain, fundamental error.

In deciding to consider a question first raised in the petitioner's brief, this Court may take into consideration the fact that a petitioner has been proceeding pro se. *Pollard v. United States*, 352 U.S. 354, 359, 1 L.Ed.2d 393, 398, 77 S.Ct. 481 (1957) (This Court considered, as a significant factor in deciding to consider a question first raised in the petitioner's brief, the fact that the petitioner had not been represented by legal counsel in the court below and in his petition for certiorari).

The defendants hide behind unsupported technical objections to the first two questions in the Geschkes' petition without answering questions that beg to be answered: Did the defendants retain the Geschkes' counsel after counsel undertook to represent the Geschkes against them? And did the defendants continue to employ the Geschkes' legal counsel all during the time that counsel was representing the Geschkes in their case against the defendants?

The defendants ask this Court to agree that unheard-of delay, admitted attorney conflict of interest, and the defendants' flagrant interference with the Geschkes' representation by legal counsel are not drastic departures from the usual and accepted course of judicial proceedings.

Equally preposterous is the defendants' assertion that the

Geschkes failed to put before the district court any evidence of a conflict of interest or prejudice resulting therefrom. The Geschkes offered such evidence and the district court refused it. (Pet. pp.15,28)

The defendants' assertion (Brief p.3) that the Geschkes somehow caused the grotesque delay in this case is a bizarre inversion of facts showing that the district court failed to control the case and allowed the defendants to obstruct and delay its progress toward trial. That delay worked to the advantage of the defendants, while in the meantime the Geschkes aged from their late fifties to early seventies.

The "numerous continuance requests" that the defendants allege but fail to identify or specify (Brief p.3) were in reality never made.

Before their case finally went to trial, the Geschkes filed two petitions for writ of mandamus. In the fourteenth year of the case, in May 1993, the first such petition was filed, after a seventeen-month delay caused by the district court's granting the defendants' meritless motion for summary judgment in favor of the principal defendant, LaSalle National Bancorp, and after the Geschkes had complied with the court's order to inspect more than 135,000 documents the defendants produced and file a detailed record of the defendants' (non)-production of requested documents. The petition asked the Seventh Circuit to order presiding judge John F. Grady to take the case to trial; it was denied one week later. The second petition, filed in August 1993, sought Judge Grady's removal from the case and went up to this Court on petition for certiorari, which was denied in March 1994. The seven-month delay caused by those two petitions does not begin to compare with the seventeen-month delay caused by the summary judgment motion, or with the fifteen-year delay caused by the defendants and, by default, the district court.

The case record (see petition for rehearing, p.1, in appeal no. 94-3586) discloses that the Geschkes diligently attempted to bring their case to trial, with no assistance from the trial court and against obstruction by the defendants.

The defendants make a transparent attempt to sow confusion as to the third and fourth questions presented in the Geschkes' petition. Neither question asserts misapplication or misstatement of law, but rather alleges a thorough disregard of this Court's controlling decisions.

Nowhere does the petition challenge the district court's right to use special verdict forms. (Pet. p.27) The petition argues that the court abused its discretion by formulating and submitting jury instructions that were prejudicially inaccurate and incomplete, and therefore misleading, were at odds with decisions from this Court, and prevented the jury from rendering a fair and just verdict. The court further abused its discretion by entering judgment in favor of all the defendants after the jury found only in favor of three and on only six of the fifteen counts against them. (Pet. pp.23-27)

The petition argues that the court abused its discretion by excluding essential evidence that went to the heart of the Geschkes' case, thereby ignoring controlling decisions from this Court. (Pet. pp.27-28)

CONCLUSION

The facts and arguments in the petition for certiorari pose an underlying question: How bad must things get before courts of review will intervene? The gross miscarriage of justice that has taken place in the Geschkes' case merits this Court's exercise of its supervisory power over the federal judiciary system. The district court failed to discharge its responsibilities in the case, and thoroughly abused its discre-

tion. The Seventh Circuit condoned that failure and abuse, and itself disregarded the controlling decisions of this Court.

And the Seventh Circuit was not content to only hand down a decision that is factually at sea, misstates issues presented and fails to address those the Geschkes actually presented. That decision is probably unique in its contemptuous and insulting dismissal of hapless plaintiffs who sustained the hardship of a fifteen-year struggle to bring their meritorious case to trial.

The issues raised in the petition for writ of certiorari must persist until fairness and justice are attained in the case.

The petition for certiorari should be granted.

Respectfully submitted,

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